

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
FINAL STATEMENT OF REASONS FOR REGULATORY ACTION

Amend Section 670.2
Title 14, California Code of Regulations
Re: Plants of California Declared to Be Endangered, Threatened or Rare

- I. Date of Initial Statement of Reasons: August 12, 2004
- II. Date of Pre-adoption Statement of Reasons: November 17, 2004
- III. Date of Final Statement of Reasons: February 7, 2005
- IV. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: October 21, 2004
Location: Concord, California
 - (b) Adoption Hearing: Date: February 4, 2005
Location: San Diego, California
- V. Update:

No modifications were made to the originally proposed language of the Initial Statement of Reasons.
- VI. Summary of Primary Considerations Raised in Support of or Opposition to the Proposed Actions and Reasons for Rejecting Those Considerations:

No public comments, written or oral, were received during the public comment period.
- VII. Location and Index of Rulemaking File:

A rulemaking file with attached file index is maintained at:
California Fish and Game Commission
1416 Ninth Street
Sacramento, California 95814

VIII. Location of Department Files:

Department of Fish and Game
1416 Ninth Street
Sacramento, California 95814

IX. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulatory Action:

List as Threatened:

Scotts Valley polygonum is known from only two populations worldwide, in Scotts Valley, Santa Cruz County, California. The total occupied area is less than one acre. The populations are threatened by habitat modification and destruction and other human-related activities, and may also be adversely affected by competition with non-native, invasive species. The species is highly vulnerable to chance events due to the small number of plants and small area of occupied habitat. Because of the small population sizes and the level and degree of threat to the species, the Department finds that the species is in imminent danger of extinction. This high level of threat meets the criteria for endangered rather than threatened status. The Department, therefore, finds that listing as threatened would not be the appropriate designation.

(b) No Change Alternative:

Attempting to bring about the protection and recovery through land management or regulatory actions of other state agencies would be inadequate. The species currently occurs entirely on private land without the benefit of any legally binding conservation easements, and is therefore guaranteed no long-term protection. Other agencies generally do not have the authorities to adequately protect or manage habitats for non-game species, nor do they usually commit the necessary funds and manpower to such efforts unless the species are officially listed as threatened or endangered. Even if such commitments or actions are forthcoming, the policy of the Legislature is that they are no substitute for the recognition and protection intended by California Endangered Species Act.

Failure to officially recognize Scotts Valley polygonum as threatened or endangered will deprive this plant of adequate consideration under CESA and the California Environmental Quality Act (CEQA). Without such recognition, Scotts Valley polygonum is at increased risk for decline and extinction. The

Department is fulfilling its statutory obligation in making this proposal (Sections 2055, 2073.5 and 2074.6, Fish and Game Code).

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

X. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states because the species is restricted to an area of less than one acre in central coastal California.

While the statutes of CESA do not specifically prohibit the consideration of economic impact in determining if listing is warranted, the Attorney General's Office has consistently advised the Commission that it should not consider economic impact in making a finding on listing. This is founded in the concept that CESA was drafted in the image of the federal Endangered Species Act. The federal act specifically prohibits consideration of economic impact during the listing process.

CESA is basically a two-stage process. During the first stage, the Commission must make a finding on whether or not the petitioned action is warranted. By statute, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process to make a corresponding regulatory change. To accomplish this second stage, the Commission follows the statutes of the Administrative Procedure Act (APA).

The provisions of the APA, specifically sections 11346.3 and 11346.5 of the Government Code, require an analysis of the economic impact of the proposed regulatory action. While Section 11346.3 requires an analysis of

economic impact on businesses and private persons, it also contains a subdivision (a) which provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. In this regard, the provisions of CESA leading to a finding are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for economic impact analysis. While the Commission does not believe this is the case, an abbreviated analysis of the likely economic impact of the proposed regulation change on businesses and private individuals is provided. The intent of this analysis is to provide disclosure, the basic premise of the APA process. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

Designation of Scotts Valley polygonum as endangered will subject it to the provisions of CESA. This act prohibits take and possession except as may be permitted by the Department, the Native Plant Protection Act, or in the California Desert Native Plants Act.

Endangered status is not expected to result in any significant adverse economic effect on small business or significant cost to private persons or entities undertaking activities subject to CEQA. CEQA requires local governments and private applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) species to be subject to the same requirements under CEQA as though they were already listed by the Commission in Section 670.2 (CEQA Guidelines, Section 15380). Based on its rarity, Scotts Valley polygonum would qualify for this protection under CEQA.

Required mitigation as a result of lead agency actions under CEQA, whether or not a taxon is listed by the Commission, may increase the cost of a project. Such costs may include, but are not limited to, purchase of off-site habitat, development and implementation of management plans, establishment of new populations, installation of protective devices such as fencing, protection of additional habitat, and long-term monitoring of mitigation sites. If the mitigation measures required by CEQA lead agency do not minimize and fully mitigate to the standards of CESA, listing could increase business costs by requiring measures beyond those required by CEQA.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

None.

- (c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Designation of threatened or endangered status, *per se*, would not necessarily result in any significant cost to private persons or businesses undertaking activities subject to CEQA. CEQA presently requires applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) and rare species to be subject to the same protections under CEQA as though they are already listed by the Commission in Section 670.2 or 670.5 of Title 14, CCR (CEQA Guidelines Section 15380). Based on its rarity, Scotts Valley polygonum would qualify for this protection under CEQA.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

- (e) Nondiscretionary Costs/Savings to Local Agencies:

None.

- (f) Programs mandated on Local Agencies or School Districts:

None.

- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

- (h) Effect on Housing Costs:

None.

Updated Informative Digest/Policy Statement Overview

The Department of Fish and Game proposes to amend Section 670.2 of Title 14, CCR, to add Scotts Valley polygonum (*Polygonum hickmanii*) to the list of endangered plants. This proposal is based upon the documentation of threats to the habitat of this species to the point that it meets the criteria for listing as endangered by the Fish and Game Commission (Commission) as set forth in the California Endangered Species Act (CESA). **At its October 21, 2004, meeting in Concord, California, the Commission found that Scotts Valley polygonum warrants listing as an endangered species, which will afford the species the recognition and protection available to it under CESA.** Scotts Valley polygonum is extremely rare; its worldwide distribution is limited to two populations in California occupying a total area of less than one acre.

Subsection (a) (27) of Section 670.2, Title 14, CCR, is amended to read:

(27) Polygonaceae (Buckwheat Family)

- (A) *Chorizanthe orcuttiana* (Orcutt's spineflower)
- (B) *Chorizanthe parryi* var. *fernandina* (San Fernando Valley spineflower)
- (C) *Chorizanthe valida* (Sonoma spineflower)
- (D) *Dodecahema leptoceras* (slender-horned spineflower)
- (E) *Eriogonum alpinum* (Trinity buckwheat)
- (F) *Eriogonum apricum* var. *apricum* (lone buckwheat)
- (G) *Eriogonum apricum* var. *prostratum* (Irish Hill buckwheat)
- (H) *Eriogonum ericifolium* var. *thornei* (Thorne's buckwheat)
- (I) *Eriogonum grande* var. *timorum* (San Nicholas Island buckwheat)
- (J) *Eriogonum kelloggii* (Kellogg's buckwheat)
- (K) *Polygonum hickmanii* (Scotts Valley polygonum)

NOTE:

Authority cited: Sections 1904 and 2070, Fish and Game Code.

Reference: Sections 1755, 1904, 2062, 2067, 2070, 2072.7 and 2075.5, Fish and Game Code.